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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 495

INTERNATIONAL ASSOCIATION OF MACHINISTS, ET AL, *Petitioners*

vs.

CENTRAL AIRLINES, INC., *Respondent*

REPLY TO PETITION FOR CERTIORARI

MUELLER & MUELLER
Burk Burnett Building
Fort Worth 2, Texas
HUDSON, KELTNER, JORDAN, SMITH & CUNNINGHAM
Continental Life Building
Fort Worth 2, Texas
Attorneys for Respondent

Of Counsel:
LUTHER HUDSON
1905 Continental Life Building
Fort Worth 2, Texas

Fort Worth Brief Printing Co., 610 S. Jennings Street Phone ED 2-6979

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REPLY TO PETITION FOR CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Central Airlines, Inc., respondent, prays that the Petition for Certiorari be dismissed or, in the alternative, that it be denied. Respondent denies jurisdiction and denies error, and in support of such contentions presents the following:

STATEMENT OF THE CASE

This was a damage suit filed by former employees of Central Airlines and their bargaining representative, International Association of Machinists, suing Central Airlines on a claim that the individual plaintiffs were wrongfully discharged from their employment as mechanics and shop employees of Central Airlines. The plaintiffs had the election to try the

case before a jury or before the Judge only, and elected to try it before the Judge. There was an extensive trial on the merits, and the Trial Court found against the plaintiffs on every issue and rendered judgment that the plaintiffs take nothing. That judgment was affirmed by the Texas Court of Civil Appeals, and application was made by the petitioners to the Texas Supreme Court for writ of error to review that decision. On initial consideration the Texas Supreme Court denied that writ, and the petitioners elected to permit that denial by the Texas Supreme Court to become final by failing to file, as they had an unconditional legal right to do, a motion for rehearing in the Texas Supreme Court. For the convenience of the Court we have divided this brief into sections as follows:

FIRST SECTION

A. The strike was illegal because any strike under the Railway Labor Act, over a matter which could have been, should have been and actually was handled through the grievance procedure and final arbitration, is illegal.

B. The strike was illegal irrespective of the Railway Labor Act, because the Union-Central Contract provided for grievance procedure and binding arbitration, and therefore any strike over a matter which could have been, should have been and was actually handled through the grievance procedure and final arbitration, was illegal.

C. The plaintiffs, who quit their jobs to participate

in an illegal strike, thereby either terminated their employment or gave the defendant employer the right to recognize same as a termination of their employment, and when the strike was concluded without any agreement by the employer to take them back, the company had no obligation to re-instate them.

D. Under undisputed facts and findings of the Trial Court supported by the evidence, the company had employed replacements for the strikers and had effected efficiencies in its operations, so that at the time the union called off the strike there were vacancies for only part of the strikers. The company, having agreed with the union only that it would re-employ the strikers in the order of their seniority to the extent that vacancies were then available, and having done so scrupulously and restored the strikers for whom vacancies were available to their former seniority, the remaining strikers for whom vacancies were not available have no cause of action against the defendant.

SECOND SECTION

If the petitioners were not barred from recovery herein because the company had a right to refuse to re-instate them under the circumstances, then they were barred having elected to follow the grievance procedure route, and the last decision of the administrative procedure having been adverse to the petitioners, they, having abandoned that route, let such decision become final and are barred from recovering for wrongful discharge.

JURISDICTION

Jurisdiction is denied.

A. This was a suit in the State Court seeking recovery of damages for wrongful discharge, and by way of alternative plea for reinstatement plus damages. The union and the plaintiffs had the option of trying the case before the Court only or before the Court and a jury, and elected to try it before a Court without a jury. There was an extensive and lengthy trial on the merits, and judgment was rendered against the plaintiffs on all points. All issues of fact were decided against the plaintiffs. Essentially, the claims made by the petitioners are a request for the United Supreme Court to review the facts and find differently thereon than did the Trial Judge. No decision by either the Trial Court or the Court of Civil Appeals is contrary to the decisions of this Court or the federal statutes. This will appear in more detail in the body of this Reply to the Petition for Certiorari.

B. Petitioners base jurisdiction on 28 U.S.C.A. Sec. 1257 (Pet. p. 3). Jurisdiction is not shown under such statute for the reason that petitioners did not file a motion for rehearing in the Texas Supreme Court within 15 days after the rendition of the judgment of that Court denying the application for writ of error. This is therefore not an appeal from the final judgment "by the highest court of a state in which a decision could be had," as required by the statute.

Petitioners (Pet. pp. 2 and 3) have correctly stated that they filed an application for writ of error in the Texas Supreme Court on May 14, 1962, and that said

application was refused without opinion on July 11, 1962. They likewise correctly state that that decision is now final. In such situation certiorari is properly directed to the Court of Civil Appeals.

The point is, however, that petitioners did not file an application for rehearing on their Petition for Writ of Error to the Texas Supreme Court within the 15 days provided therefor. Texas Rule of Civil Procedure No. 515 is copied in full in the appendix hereto p. 47, the pertinent portion reading:

> "A motion for rehearing may be filed with the clerk of the court within fifteen days after the date of rendition of judgment or decision of the court or order refusing or dismissing an application for writ of error, whether such date be in the same or succeeding term of court."

The filing of such application is a matter of right, and not merely a petition to the discretion of the Texas Supreme Court. It is in exactly the same status as the original Application for Writ of Error to the Texas Supreme Court, as authorized by Articles 1728, 1729 and 1730, Revised Civil Statutes of Texas, copied in full in the appendix hereto p. 46. The appellate procedure in the state of Texas has been fully described by Associate Justice Smith of that Court in 1 *South Texas Law Journal*, beginning at page 121. With reference to motions for rehearing on applications for writ of error, Judge Smith says (p. 128):

> "When a motion for rehearing on an application for writ of error is filed, the motion and the record are returned for further study to the justice who reviewed the application originally and

> copies of the motion are distributed to all the justices for their study. The questions involved are again discussed in full conference when report is made on the motion for rehearing."

Petitioners, having failed to take advantage of the right of additional review by the Texas Supreme Court, are not appealing from the final judgment of the final court, but, by reason of their election or neglect, have chosen to permit the judgment of the Court of Civil Appeals to become final.

In such circumstances there is no jurisdiction in this Court under 28 U.S.C.A. Sec. 1257.

Osment vs. Pitcairn, 317 U.S. 587, 87 L.Ed. 481, 63 S.Ct. 21;

Gorman vs. Washington University, 316 U.S. 98, 86 L.Ed. 1300, 62 S.Ct. 962;

McMaster vs. Gould, 276 U.S. 284, 72 L.Ed. 574, 48 S.Ct. 299;

Mathews vs. Huwe, 269 U.S. 262, 70 L.Ed. 266, 46 S.Ct. 108;

Southern Electric Co. vs. Stoddard, 269 U.S. 186, 70 L.Ed. 227, 46 S.Ct. 71;

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Mullen vs. Western Union Beef Co., 173 U.S. 226, 43 L.Ed. 635, 19 S.Ct. 877;

Annotation, 56 L.Ed. 1082.

Petitioners recognized both the efficacy and the necessity of such a motion for rehearing by attempting to file such motion beyond the 15 days. We attach in the

appendix (p. 45) a copy of the letter from the Clerk of the Supreme Court of Texas with reference thereto.

It is respectfully submitted that jurisdiction does not exist.

QUESTIONS PRESENTED

We cannot accept the questions presented by petitioners, nor can we without some explanation merely set out the question presented from the respondent's viewpoint.

This is because the petitioners, without telling the Court that they are doing so, in each of their questions presented makes an attack on the fact findings of the Trial Court without claiming that such findings are not well supported by the evidence. To demonstrate this we will quote the questions presented in the Petition for Certiorari (p. 3) and then follow each of those two questions presented with a quotation from the record. Petitioners' first question presented is:

> "1. Whether, under the Railway Labor Act and the collective bargaining contract in effect, a strike protesting denial of union representation is a strike arising over a 'minor dispute' and therefore illegal."

The statement that there was "a strike protesting denial of union representation" is factually untrue under the undisputed record. Factually, the Trial Court found (Tr. 52):

> "The contemplated conference or interview in Vaughan's office was not a hearing within the meaning of Section 22 of the contract. It was

merely an investigation or inquiry which the company had the right to make before it took any further action. *Moreover, if the conference or meeting could be classified as a hearing, it is obvious from the evidence that no hearing ever took place. Since no hearing took place at which the six employees were denied representation, the working agreement between the company and the union could not have been violated. Looking at the testimony in the most favorable light to the plaintiffs, and assuming that the conference in Vaughan's office was intended as a hearing, at most it was merely an attempt to violate the contract, which attempt was never actually consummated.* As a matter of fact, the complaint of the six mechanics was handled in the usual manner provided by Section 22, with grievances properly filed and hearings had, at which time the complainants were properly represented by representatives of the union. Again looking at the matter in the most favorable light to the union, if it be admitted the meeting in Vaughan's office was the kind of conference or interview where the men were entitled to representation, the whole argument involved a minor grievance involving an interpretation of certain proisions of the working agreement between the company and the union. Not only was the matter of union representation at the hearing or meeting in Vaughan's office a matter which must be classified as a minor grieance, but the question of overtime is also in the same category." (Emphasis add 1.)

Petitioners' second question presented:

"2. Whether an air carrier violates the Railway Labor Act by withdrawing its members from a System Board of Adjustment, thus tem-

> porarily disestablishing such board, and whether discharged employees and the certified union representative, because of consequent inability to exhaust System Board remedies, thereby waive right to obtain judicial redress for the carrier's violation of the collective bargaining agreement and the Railway Labor Act."

The statement of the question presented is that the company disestablished the System Board of Adjustment, which is legally impossible, but in any event was contrary to the facts and the findings of the lower courts. For example, we quote from the opinion of the Court of Civil Appeals (quoting 355 S.W. 2d at the top of page 808):

> "At no point did the company so act or refuse to act as to block orderly processing of the cases, and indeed to do so would not be within its power, albeit, as already mentioned, it delayed matters when it could and it at all times contested the right of jurisdiction of those provided and/or required to make determinations — under the theory that the employer-employee relationship which had formerly existed between it and the strikers was voluntarily severed by the employees themselves as the result of their unilateral unlawful strike action. After having petitioned for a neutral referee the union (and the individuals) withdrew application therefor (and for further action under grievance procedure). The suit in district court was filed."

With this explanation, respondent says that the question which petitioners really present by the Application for Certiorari is:

"QUESTION PRESENTED

"Whether the United States Supreme Court can or should review fact findings made by the Trial Court amply supported by the evidence."

PRELIMINARY STATEMENT

As has heretofore been pointed out, this was a trial on the merits before the Court without a jury. The fact that it was tried before a Court rather than before a jury was a matter under the Texas practice over which the petitioners had complete control. They elected to waive a jury and try the case before the Court. The Court rendered judgment against plaintiffs on all contentions. The petitioners did not ask for findings of fact and conclusions of law, and under Texas practice the rules applicable to an appeal from a trial on the merits before the Court without a jury, where no findings of fact or conclusions of law are requested by the appealing party, are stated in the following quotations from *Pecos Mining Co. vs. Richardson*, 318 S.W. 2d 3. Since the principles are beyond dispute, in the interest of brevity we have omitted the authorities contained in the opinion.

> "Concerning the alleged insufficiency of the evidence, it will be observed that no findings of fact or conclusions of law were requested or filed by the trial court, other than the few findings made in its judgment in support thereof. That being true, it is implied that all other necessary fact findings were made in support of the judgment. Under the facts and circumstances presented here, we are required, in determining the sufficiency of the evidence in support of the implied findings, to

consider only that evidence most favorable to the implied findings upon the issues raised and to disregard entirely all evidence to the contrary. *(authorities omitted)* Under the record presented here every issue raised by the evidence must be resolved in favor of the trial court's judgment. *(authorities omitted)* The judgment of the trial court will be affirmed if there is evidence to support it upon any reasonable theory authorized by law. *(authorities omitted)* When a court of competent jurisdiction has rendered judgment in a civil case it must be presumed that the judgment appealed from is correct unless the contrary is made to appear affirmatively from a proper record of the proceedings had in the trial court. *(authorities omitted)* In this case the trial judge was the trier of facts and the sole judge of the credibility of the witnesses and the weight to be given to their testimony and had the right to believe or disregard any evidence. *(authorities omitted)*"

The Trial Court rendered a written opinion (Tr. p. 48 et seq.). The opinion summarizes the evidence, and while under Texas practice (*Ramirez vs. Milton Provision Co.*, 231 S.W. 2d 547) it does not take the place of findings of fact and conclusions of law, it is quite helpful.

Petitioners' statement (Pet. p. 4 et seq.) disregards the record and disregards the fact that this was a trial before the Court without a jury at petitioners' election and that the Trial Court rendered judgment against the plaintiffs on every fact. Petitioners would have the Court believe that this was a suit by petitioners for a declaratory judgment or for an injunction to determine the validity of the actions of the

System Board of Adjustment. Nothing could be further from the truth. This was a suit by petitioners claiming that they were wrongfully discharged by Central Airlines and seeking to recover damages and, in the alternative, for re-instatement plus damages (Plaintiffs' Original Petition, Tr. 3 to 20). That was the case tried and decided.

Petitioners' statements as to the evidence presented to the Trial Judge are so absurdly incomplete as to very nearly constitute a misrepresentation of the record. Such method of presenting the facts forces us to make a much longer factual statement than would otherwise be justified. Additionally, in several instances the Court of Civil Appeals (but not the Trial Court) has misunderstood the record and consequently failed to summarize it correctly. For example, in the opinion and referring to the conferences between the company and union representatives before the strike was called off, the Court of Civil Appeals said:

> "There was no written agreement in settlement of the strike, and there were no oral commitments by the company regarding the restoration to duty of all or any of them. The company merely stated that it would take each individual as he appeared and process his case."

That is incorrect, as we will show by reference to the record subsequently. What actually happened was that the union demanded that the company fire all the permanent replacements and take back every striker. The company, on the other hand, would agree only that it would take strikers back to the extent that it then had vacancies available, and would take those

strikers back in the order of their seniority. The strikers that were taken back were restored to their full seniority, and, as the chief union representative admitted, the company scrupulously lived up to its agreement to take back the strikers in the order of their seniority to the extent that there were vacancies available. Nor is the Court of Civil Appeals statement that "none of the strikers were ever served with notice of discharge either orally or in writing" correct, since oral notice was given by the company to the union representative, and written notices were sent out on May 9, 1958 to all of the strikers who were not re-employed.

With that general statement, we can take the following from the Trial Court's memorandum opinion (Tr. 48) to get a synopsis of the occurrences which led up to the strike:

> "For some time prior to April 7, 1958, the union and the company had been discussing amendments to their working agreement, one of which involved the allocation and performance of overtime. On April 4 (Friday) the company requested six union mechanics to work overtime on a plane that was in need of emergency repairs before it could be put back into service. All six of the mechanics refused to work overtime on that occasion. Over the week-end the six mechanics in question received written notice from the company that they were suspended from service pending an explanation of their refusal to work overtime as requested, the notice further stating that they should report to Mr. Vaughan, Director of Maintenance, at his office on April 7 (Monday) at eight o'clock A.M. for such purpose, at which

time their excuses would be considered by Mr. Vaughan. The notice went on to state that if their reasons were satisfactory, they would be put back on the job with full pay; otherwise, disciplinary action would be considered. At the hour stated in the notice union representatives appeared at Vaughan's office with the six men involved and demanded that the men be represented at the meeting in Vaughan's office. Vaughan took the position that it was not a union matter and he merely wanted to talk to the men and ascertain their reasons for refusing to work overtime on the plane in question. When the union representatives and the men involved made their position known, Mr. Vaughan reported the matter by 'phone to Mr. Wageneck, his immediate superior, and the latter told Vaughan to send the group to the office of Mr. Howe, Executive Vice-President and Treasurer of the company. When the group arrived at Howe's office, Mr. Wageneck and the company's attorneys were waiting. Apparently the company had anticipated a dispute and had the persons above named present, together with a court reporter, in order that a record might be made of whatever might take place. An argument there ensued, the union representatives contending that the interview or meeting called for Vaughan's office was a hearing within the meaning of Section 22 of the working agreement, which gave the mechanics the right to be represented by the union, while the company contended that no such hearing was intended and that the meeting in Vaughan's office was called merely in order that Mr. Vaughan might be advised as to the individual reasons of the six mechanics for their refusal to work overtime.

"After the company officials and their attorneys had argued back and forth with the union representatives over a considerable period of time no agreement could be reached and the union representatives and the six men left the office of Mr. Howe. The officials of the company and their attorneys then went to the hangar for the purpose of talking to the six men involved, but found that they had left the premises shortly before. The same afternoon the union sent a wire to the company protesting the dismissal of the six men and the company's alleged refusal to grant union representation at the meeting in question and threatened concerted action, unless the men involved were immediately reinstated. The telegram also mentioned the position of the union on the matter of what it called 'forced overtime.'

"The same night at a regular meeting of the union the matter was reviewed and the men were advised by its leaders that a strike would be legal under the circumstances. A unanimous vote to strike resulted, and the mechanics struck at midnight of the same date. On the following morning, April 8, grievances were duly filed in behalf of the six dismissed mechanics and a hearing was had on April 12 while the strike was still pending."

These grievances, about which there will be considerably more talk later, were actually prepared by the six overtime parties (Cornstubble Six) immediately after they walked off Centrals premises and *before* the strike vote and before the commencement of the strike (see testimony of Faircloth, S.F. Vol. II, pp. 504-505). We want to emphasize this, because it demonstrates beyond the power of argument that not

only the Union but the employees themselves were well aware of the fact that both the question of the "hearing" before Vaughan and the question of overtime were matters which could be and would be properly handled by following the grievance procedure.

Next, and equally important, is the fact that the Union called the strike, not because the employees were forced into a hearing where a Union man was not present, but merely because the Company had the arrogant audacity to argue that, under the contract between the Union and the Company, the right of Union officials to be present did not begin until there was a grievance filed. *In short, there was no hearing on April 7 at which a Union official was not present.* It is undisputed that the Cornstubble Six *did not* permit Vaughan to talk to them without the Union man being present. It is undisputed that the only "hearing, interview, interrogation or meeting" held on April 7, 1958 was that held in Howe's office, of which there is a verbatim transcript by Court Reporter Toal (Toal Transcript, Plaintiff's Exhibit 4-D S.F. p. 556 SEQ). The Court ought to read the entire Toal transcript (it is only 21 pages), for it negatives virtually every contention which plaintiffs are making in this lawsuit. But here we want to emphasize that at that meeting L. T. Faircloth, I.A.M. Grand Lodge representative, and George Neal, Union president, were present and Faircloth argued not only the right, under the contract, of the Cornstubble Six to have a Union man present at the Vaughan interview, but he argued the Union's position on overtime. In other words, there was no hearing on April 7, 1958 at which the Union

representative was excluded. The strike was called not because the Cornstubble Six were denied Union representation at a hearing but because the Company had the awesome arrogance to disagree with the Union interpretation of the contract. The Union's position was simply that any company who disagreed with the Union as to the interpretation of a contract must be punished. See testimony of Faircloth, S.F. Vol. II, p. 512 and pp. 523 to 525, from which last page we take the following illustrative quote:

> "What were you talking about as 'disciplinary action'? Was the union disciplining Central? Was the union discipling Central Airlines by striking?
>
> "Yes, sir."

While we recognize that the Trial Court's opinion is only "helpful," we think it would be worthwhile here to quote the Trial Court's discussion of this particular point (Tr. 52):

> "The contemplated conference or interview in Vaughan's office was not a hearing within the meaning of Section 22 of the contract. It was merely an investigation or inquiry which the company had the right to make before it took an further action. Moreover, if the conference or meeting could be classified as a hearing, it is obvious from the evidence that no hearing ever took place. Since no hearing took place at which the six employees were denied representation, the working agreement between the company and the union could not have been violated. Looking at the testimony in the most favorable light to the plaintiffs, and assuming that the conference

in Vaughan's office was intended as a hearing, at most it was merely an attempt to violate the contract, which attempt was never actually consummated. As a matter of fact, the complaint of the six mechanics was handled in the usual manner provided by Section 22, with grievances properly filed and hearings had, at which time the complainants were properly represented by representatives of the union. Again looking at the matter in the most favorable light to the union, if it be admitted the meeting in Vaughan's office was the kind of conference or interview where the men were entitled to representation, the whole argument involved a minor grievance involving an interpretation of certain provisions of the working agreement between the company and the union. Not only was the matter of union representation at the hearing or meeting in Vaughan's office a matter which must be classified as a minor grievance, but the question of overtime is also in the same category."

Generally, when one party determines to punish, discipline or kick another party around, the opposite party has the choice of taking it lying down or defending itself. Central elected to defend itself. That its defense was justified is shown by the fact that none of the other unionized employees of Contral recognized the I.A.M. picket line and all of them continued to work. Central flew its airplanes and did not miss a flight. It commenced hiring *permanent replacements*, after a public announcement to that effect, advertisements in the paper, etc. It took its supervisory force and put them to work as mechanics. It changed methods and increased efficiency. It arranged

for the outside contractors to handle some of the work that had formerly been handled in the shop. In other words, Central kept its airlines flying and kept its maintenance going while the strike was on.

As indicated above, the strike started at midnight on April 7 or 12:01 on April 8, 1958, and on April 14, 1958 the Union heads (Faircloth and Harvey) asked for a meeting with the Company. Their story was that the reason for asking for the meeting was because on that same day the first step of the grievance procedure on the Cornstubble Six's grievances for their suspension and discharge had been held and the Union had represented the Cornstubble Six at that meeting. Actually, of course, the evidence would support somewhat more strongly the conclusion that their reason for wanting the meeting was that Central very successfully was carring on its operations, that it was carrying on a very active campaign to obtain permanent replacements for the strikers, and none of the other unions had supported I.A.M. in its disciplinary action against the airline. This meeting took place and is described in detail by Central's Vice President Howe (S.F. Vol. II, p. 598 et seq.) and by Karl Mueller (S.F. Vol. II, p. 648 et seq.). Howe (S.F. Vol. II, p. 599) gave a condensed version:

> "Q. All right. Tell the Court, according to your best recollection, what occurred at that meeting on the afternoon of April the 14th, 1958.
>
> "A. Well, continuing the approach that whoever contacted me earlier in the day had made at that time, they — the union boys came in and they said they had now had their hearing which

was what they were striking about; they'd had full union representation and so forth, and they were ready to go back to work. And I told him they didn't ask our permission to take the boys out, so they didn't have to ask our permission to take them back.

"They said well, they were ready to put them back to work, and we were all of course in the discussion, but either Karl Mueller or myself told them that this was all very fine, but 'you know we have been hiring permanent replacements; we're continuing to hire permanent replacements as we can find qualified people; there are a number of the jobs which the men vacated voluntarily on midnight of the 7th that have been filled; commitments have been made for certain of the other jobs. The reason commitments have been made but the men were not physically present was because they had to give notice to their present employer; and that further the company had re-evaluated its maintenance department in view of the strike. We had determined in a policy meeting that we didn't have sufficient supervisory people there; that we had employed more supervisor; we had learned some things as to efficiencies and non-efficiencies, and we had eleminated certain jobs, so that if the men wanted to return, it was with the full knowledge that there were only—there were certainly a lesser number of vacancies available than there were jobs when the men voluntarily left the employ of the company and went out on strike.'

"With that, Mr. Faircloth, and admittedly I'm condensing this thing and making it very succinct, but Mr. Faircloth then told me, and I can remember these words because I usually remem-

ber threats, he said, 'Well, you ain't seen nothing yet then, if that's the way you want it. You ain't going to take them back, well, we'll get tough and show you how to really get rough on this thing'.

"And I can remember my reaction, because it's usually the same to things like that: 'Well, we've taken all you've handed out so far and we'll attempt to take anything you can hand out in the future.' "

The conference was a three- or four-hour conference, and the above is summary of the portion we want to talk about now. For a full discussion of it, see the testimony of Karl Mueller (S.F. p. 648 et seq.).

Following that, both the Union and the Company representatives appeared before the pilots union (Howe, S.F. Vol. II, p 601), and after the pilots would not support I.A.M.'s punishment of Central, the Union called for another meeting, which was held on April 16, 1958. Howe describes it (S.F. Vol. II, p. 610 et seq.). Mueller describes it (S.F. Vol. II, p. 666 et seq.). There the Company again reiterated its refusal to take back more strikers than there were vacancies available, and again said the best it would do would be take back the strikers, in the order of their seniority, to the extent that there were vacancies available. The Union officials then said they were calling off the strike effective that midnight and that the strikers would report their availability for employment to the employment office on April 17. The strike was called off at midnight on the 16th, and the strikers did report their availability to Central's

employment office, where their names, addresses and telephone numbers were taken.

The foregoing constitutes a rather full statement of everything involved except a reference to the evidence about the filing, processing and denial of the grievances by the petitioners in this case (not the Cornstubble Six), but an accurate summary of the record in that respect is contained in the Court of Civil Appeals opinion, a part of which we quoted under "Questions Presented," and we will not repeat it here.

FIRST SECTION

A. The strike was illegal because any strike under the Railway Labor Act, over a matter which could have been, should have been and actually was handled through the grievance procedure and final arbitration, is illegal.

B. The strike was illegal irrespective of the Railway Labor Act, because the Union-Central Contract provided for grievance procedure and binding arbitration, and therefore any strike over a matter which could have been, should have been and was actually handled through the grievance procedure and final arbitration, was illegal.

C. The plaintiffs, who quit their jobs to participate in an illegal strike, thereby either terminated their employment or gave the defendant employer the right to recognize same as a termination of their employment, and when the strike was concluded without

any agreement by the employer to take them back, the company had no obligation to re-instate them.

D. Under undisputed facts and findings of the Trial Court supported by the evidence, the company had employed replacements for the strikers and had effected efficiencies in its operations, so that at the time the union called off the strike there were vacancies for only part of the strikers. The company, having agreed with the union only that it would re-employ the strikers in the order of their seniority to the extent that vacancies were then available, and having done so scrupulously and restored the strikers for whom vacancies were available to their former seniority, the remaining strikers for whom vacancies were not available have no cause of action against the defendant.

ARGUMENT

Unless this Court is going to give the petitioners a de novo review of the facts, the case presented to this Court is as follows:

Central Airlines ordered six employees (the Cornstubble Six) to work overtime. They refused, (April 4, 1958) and the company ordered them to go to their foreman at 8 A.M. Monday, April 7th and give him the reasons why they refused to work. The men refused to attend such interview unless they were accompanied by union representative, and the company refused to let the union representative be present. Therefore, no meeting was held, no interview was had, no hearing took place at which the employees were denied union representation. As a matter of fact,

at that very time the union representatives and the men did have a meeting with the company representatives, and the union representatives (particularly Faircloth) held forth at length and none of the Cornstubble Six so much as opened his mouth or was asked a question. The company fired the six employees for refusal to work overtime and for refusal to give reasons for not working overtime. The six fired employees prepared their grievances on April 7, 1958 in the morning. That night the union held a meeting and called a strike effective at midnight. On the 8th the grievances for the Cornstubble Six were filed, and they were processed through the grievance procedure and ended up ultimately in an award favoring the six employees and ordering their re-instatement with back pay.

The processing of the grievances and the award is conclusive proof that the matters complained of, and for which the strike was called, not only could have been grieved but were actually grieved and successfully handled through the grievance and arbitration procedure. The strike started after the grievances were prepared but before they were filed, but continued after they were filed and, as a matter of fact, after the first hearing on the grievances. Also, during the strike the company elected to continue its service to the public and to protect itself by employing permanent replacements, rearranging its work, effecting efficiencies, and arranging to have some of the work done by independent contractors. When the union and the employees observed the company's success in maintaining its operations and in hiring replacements

for the strikers, the union approached the company asking for terms on which the strike could be called off. The first meeting broke up when the company refused to fire the replacements and hire back all of the strikers. At the second meeting the company offered to take back the strikers in the order of their seniority, to the extent that there were then vacancies available. Whether the union expressly agreed to that might be an issuable fact, but that it did call off the strike on those terms is undisputed. It is also undisputed that the company lived up to its agreement scrupulously, taking back the strikers with the most seniority and restoring them to their old seniority. The plaintiffs in this case are the strikers who did not have enough seniority to get their jobs back, and a few who for a short time had to take lower classification jobs because the strikers who were taken back had more seniority than they did.

The Trial Court and the Court of Civil Appeals both held that the strike was illegal. That holding was correct, first because under the Railway Labor Act (45 U.S.C.A. Secs. 151-188) a strike by railway or airline employees over minor matters, which could have been and should have been and were handled through the grievance and arbitration procedure, is illegal.

B. of R.T. vs. C.R.I. & R. Co., 353 U.S. 30, 1 L.Ed. 2d 622, 77 S.Ct. 635;

B.L.E. vs. M.K.T. R. Co., 363 U.S. 528, 4 L.Ed. 2d 1379, 80 S.Ct. 1326;

B.R.T. vs. N.Y. C. R. Co. (6th C.C.A.), 246 F. 2d 114;

L. & N. R. Co. vs. B.L.E., 190 F. Supp. 829;
Hilbert vs. Pennsylvania R. Co. (7th C.C.A.), 290 F. 2d 881;
Ringle vs. Transcontinental & Western Air, Inc., 113 F. Supp. 897;
Sigfried vs. Pan Am Airlines (5th C.C.A.), 230 F. 2d 13;
B.R.T. vs. RR Retirement Board (District of Columbia C.C.A.), 239 F. 2d 37;
American Airlines vs. Airline Pilots Ass'n, 169 F. Supp. 777;
Rutland Ry. Corp. vs. B.L.E., 188 F. Supp. 721;
Northwest Airlines vs. Transport Workers Union, 190 F. Supp. 495;
L. & N. R. Co. vs. Brown (5th C.C.A.), 252 F. 2d 149;
Pennsylvania R. Co. vs. T.W.U., 178 F. Supp. 30;
B. & O. R. Co. vs. United R. Workers, (2nd C.C.A.), 271 F. 2d 87;
Pennsylvania R. Co. vs. Local 2013, 178 F. Supp. 53;
Northwest Airlines vs. I.A.M., 178 F. Supp. 825;
N. & P. B.L.R. Co. vs. B.R.T. (4th C.C.A.), 248 F. 2d 34.

Secondly, the strike was illegal because under the union contract, which provided a grievance procedure and an arbitration procedure, the strike would have been illegal even if the Railway Labor Act had not applied and the National Labor Relations Act had

applied. This Court made a conclusive determination of that rule in the case of Local 174, *Teamsters Union vs. Lucas Flour Co.*, 369 U.S. 95, 7 L.Ed. 2d 593, 82 S.Ct. 571, from which we quote:

> "Whether, as a matter of federal law, the strike called was a violation of the collective bargaining contract is thus the ultimate issue which this case presents. It is argued that there could be no violation in the absence of a no-strike clause in the contract explicitly covering the subject of the dispute over which the strike was called. We disagree.
>
> "The collective bargaining contract expressly imposed upon both parties the duty of submitting the dispute in question to final and binding arbitration. In a consistent course of decisions the Court of Appeals of at least five Federal Circuits have held that a strike to settle a dispute which a collective bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration constitutes a violation of the agreement. The National Labor Relations Board has reached the same conclusion. W. L. Mead, Inc., 113 NLRB 1040. We approve that doctrine. To hold otherwise would obviously do violence to accepted principles of traditional contract law. Even more in point, a contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warefare. See United Steelworkers of America v. Gulf Nav. Co., 363 U.S. 574, 3 L ed 2d 1409, 80 S.Ct. 1347."

The foregoing specifically approve the holdings of the Circuit Courts in:

International Brotherhood, etc. vs. W. L. Mead,

Inc. (1st C.C.A.), 230 F. 2d 576, p. 583;
N.L.R.B. vs. Dorsey Trailers (5th C.C.A.), 179 F. 2d 589;
United Const. Workers vs. Haislip (4th C.C.A.), 223 F. 2d 872;
Gays Express, Inc. vs. Intl. Brotherhood, etc., 169 F. Supp. 834;
Lewis vs. Benedict Coal Co., 259 F. 2d 346, affirmed 361 U.S. 459, 4 L.Ed. 2d 442, 80 S.Ct. 489.

The Trial Court and the Court of Civil Appeals both held that the strike was illegal, which it obviously was for both reasons heretofore given. The participation in an illegal strike has been held repeatedly by this Court to constitute a termination of the employment by the strikers.

To present this we are going to let the following quotation speak for us. We quote from *N.L.R.B. vs. Sands Mfg. Co.*, 306 U.S. 332, 83 L.Ed. 682, quoting from 83 L.Ed. at p. 690:

> "Respondent rightly understood that the men were irrevocably committed not to work in accordance with their contract. *It was at liberty to treat them as having severed their relations with the company because of their breach and to consummate their separation from the company's employ by hiring others to take their places.* The Act does not prohibit an effective discharge for repudiation by the employee of his agreement, any more than it prohibits such discharge for a tort committed against the employer." (Emphasis added)

The same principle was announced and applied in:

N.L.R.B. vs. Fansteel Metallurgical Corp., 306 U.S. 240, 59 S.Ct. 490, 83 LEd. 627;
Southern Steamship Co. vs. N.L.R.B., 316 U.S. 31, 86 L.Ed. 1246, 62 S.Ct. 886;
N.L.R.B. vs. Drivers Local Union, 362 U.S. 274, 4 L.Ed. 2d 710, 80 S.Ct. 706.

The same principle has been recognized and applied in many Circuit Court cases, including by way of illustration:

B. of R.T. vs. New York C. R. Co. (6th C.C.A.-cert. denied), 246 F. 2d 114;
Ohio Ferro-Alloys Corp. vs. N.L.R.B. (6th C.C.A.-cert. denied), 213 F. 2d 646;
Local No. 3, etc. vs. N.L.R.B. (8th C.C.A.-cert. denied), 210 F. 2d 325.

Under the foregoing authorities then, these strikers participated in an illegal strike and thereby terminated their employment, so the company would have been well within its rights if it had taken back no striker except on the basis of their applying as new employees However, that is not what happened. The company, instead of standing on its strict legal rights, took back the strikers, in the order of their seniority and with full restoration of their seniority rights, to the extent that it had jobs available.

Even if this had been a legal strike, that is, one for a legal purpose and one not in violation of both the contract and the Railway Labor Act, the company

would have had the unquestioned right to defend itself from the economic pressures of the strike by hiring replacements and rearranging its work. And, assuming a legal strike, the company would only have been obligated to do what it did, to-wit, take back the strikers on a non-discriminatory basis (seniority here), and not deny them restoration of their seniority. In other words, in short, Central Airlines here took back the strikers exactly as it would have done had the strike been legal, and surely participants in an illegal strike are not entitled to greater rights than participants in a legal strike.

Now, what is the law with reference to the right of a company to protect itself from the economic pressure of a strike?

The following Language from *NLRB vs. Mackay Radio & T. Co.*, 304 U.S. 33, 58 S.Ct. 910, 82 L.Ed. 1381, is pertinent to the point here under discussion:

> "*. . . Nor was it an unfair labor practice to replace the striking employees with others in an effort to carry on the business. Although § 13 provides, 'Nothing in this Act shall be construed so as to interfere with or impede or diminsh in any way the right to strike,' it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the place of strikers, upon the election of the latter to resume their employment, in order to create places for them. . . .*
>
> * * *
>
> "*As we have said, the respondent was not*

bound to displace men hired to take the strikers' places in order to provide positions for them. . . ." (Emphasis added.) p. 1390.

Or, quoting from *N.L.R.B. vs. Robinson* (6th C.C.A. cert. denied), 251 F. 2d 639, pages 640 and 641:

> "In July, 1954, the union and respondent disagreed as to the interpretation of the bargaining contract under which respondent had laid off two employees. The controversy was handled as a grievance but, while grievance proceedings were carried out on both sides, the matter was deadlocked. Early in October, 1954, *the union struck respondent's operation in Knoxville, Tennessee, in order to compel respondent to accept its interpretation of the contract.* The strike lasted only seven hours, as a state court enjoined the strike. The strike was renewed on October 18, the injunction being dissolved, and was abandoned on December 10, 1954."
>
> * * * * *
>
> "*This was an economic strike in which respondent was entitled to hire permanent replacements and was compelled to reinstate only so many strikers as there were vacant places to be filled at the temination of the strike.*" (Emphasis added.)

The *Mackay* doctrine has never been questioned. See, for example:

> *Associated Unions of America vs. N.L.R.B.* (7th C.C.A.-cert. denied), 200 F. 2d 52;
> *Vogue Lingerie, Inc., vs. N.L.R.B.* (3rd C.C.A.-cert. denied), 280 F. 2d 224;

Shopmens Local vs. N.L.R.B. (6th C.C.A.-cert. denied), 219 F. 2d 874;
N.L.R.B. vs. Wooster (6th C.C.A.-cert. denied), 236 F. 2d 898;
N.L.R.B. vs. W. L. Rives (5th C.C.A.-cert. denied), 288 F. 2d 511;
Vulcan-Cincinnati, Inc. vs. United Steel Workers (6th C.C.A.-cert. denied), 289 F. 2d 103.

We therefore say that these petitioners, the plaintiffs in the Trial Court, being the strikers who did not have enough seniority to entitle them to a vacant position, had no cause of action against the respondent, defendant in the Trial Court. This is true, whether the case be tested under the Railway Labor Act or under the National Labor Relations Act.

Of course, petitioners have some twaddle about unfair labor practice, but they cannot support it by any reference to the record nor by any authorities. In the first place, there was no unfair labor practice, unless it is an unfair labor practice to disagree with the union's interpretation of the contract. The union's statement that there was "a denial of union representation" is just not true. Not only the record but also the Court of Civil Appeals opinion and the opinion of the Trial Court make such a statement an outright misrepresentation. If the union had won this case, so that every disputed issue of fact would be resolved in its favor and the record would be construed most favorably to it, the most that could be said was that the company attempted to hold a hearing involving employees at which it attempted to exclude union rep-

resentatives, but through the diligence of the union such attempt was defeated. Or, as the Trial Court put it (Tr. 52):

> "Moreover, if the conference or meeting could be classified as a hearing, it is obvious from the evidence that no hearing ever took place. *Since no hearing took place at which the six employees were denied representation, the working agreement between the company and the union could not have been violated. Looking at the testimony in the most favorable light to the plaintiffs, and assuming that the conference in Vaughan's office was intended as a hearing, at most it was merely an attempt to violate the contract, which attempt was never actually consummated.* As a matter of fact, the complaint of the six mechanics was handled in the usual manner provided by Section 22, with grievances properly filed and hearings had, at which time the complainants were properly represented by representatives of the union." (Emphasis added.)

The Court will notice that the foregoing quotation construes the evidence most favorably to the losing party, to-wit, the plaintiffs. If the evidence is construed most favorably to support the Trial Court's judgment, as it must be, then the Trial Court's finding is and was that the company had no intention of holding the character of hearing contended for by the union, and consequently the company was correct in its position that the union representation, which they conceded the Cornstubble Six was entitled to, began when the company's investigation was completed and discipline was finally assessed.

There are some other statements in the Petition for Certiorari with reference to "unfair labor practice strikes," but, as the record shows, what was here involved was a strike over a matter which could have been, should have been and actually was successfully handled through the grievance and arbitration procedure. Under the Railway Labor Act, there is no such thing as "unfair labor practice strikes" over a matter which could have been and should have been handled through the grievance and arbitration procedure. In addition to the cases heretofore cited, the breadth of this Court's decision in *B.L.E. vs. M.K.T. Ry. Co.*, 363 U.S. 528, 4 L.Ed. 2d 1379, 80 S.Ct. 1326, negatives the possibility of a valid strike under the Railway Labor Act over any matter which could be handled through the grievance procedure to binding arbitration.

In addition, we should point out that the Trial Court specifically found no unfair labor practice (Tr. 53), saying:

> "I cannot go along with the contention of the plaintiffs that the employees could engage in an illegal strike and still retain their employee status under the contract, particularly where the strike was not precipitated by unfair labor practices."

Here again, all the petitioners are doing is asking this Court to ignore the fact findings against the petitioners and permit them to make the same argument on the facts that they made in the Trial Court unsuccessfully.

We say that for all of the foregoing reasons there

is no jurisdiction, and if the Court granted this Application for Certiorari, the only judgment it could enter would be one affirming the decision of the Texas Courts.

SECOND SECTION

If the petitioners were not barred from recovery herein because the company had a right to refuse to re-instate them under the circumstances, then they were barred having elected to follow the grievance procedure route, and the last decision of the administrative procedure having been adverse to the petitioners, they, having abandoned that route, let such decision become final and are barred from recovering for wrongful discharge.

ARGUMENT

The respondents deem that no detailed statement is necessary under this, for the reason that the Court of Civil Appeals dealt with it rather elaborately.

First, let us point out that in our brief in the Court of Civil Appeals we presented the authorities showing that the Trial Court had no jurisdiction to enter a judgment of reinstatement and that the only cause of action of which the Trial Court did have jurisdiction was the one asserted by the plaintiffs in this lawsuit for recovery of money damages for wrongful discharge. Such a cause of action for damages for wrongful discharge requires the recognition by the plaintiffs that their employment has been permanently terminated. See particularly *Transcontinental & West-*

ern Air vs. Koppal, 345 U.S. 653, 73 S.Ct. 906, 97 L.Ed. 1325; *Slocum vs. D. & L. W. R. Co.*, 339 U.S. 239, 70 S.Ct. 579, 94 L.Ed. 795; *Moore vs. Illinois Central R. Co.*, 312 U.S. 630, 61 S.Ct. 754, 85 L.Ed. 1089.

Under the foregoing cases *(Transcontinental & Western Air vs. Koppal*, and *Slocum vs. D. &. L. W. R. Co.)* it should be kept in mind that some states require that before an action for wrongful discharge can be brought the plaintiff *must* exhaust his administrative remedies through the grievance procedure. (See 72 *A.L.R.* 2d 1439). That, of course, is not the law in Texas since *T. & N.O. R. Co. vs. McCombs*, Tex. S.Ct., 183 S.W. 2d 716. It follows therefore that in those states (not Texas) where the exhaustion of the administrative remedies is required as a condition precedent to a damage suit for wrongful discharge, the commencement of the grievance procedure for reinstatement does not constitute a binding election. See, for example, *Sjaastad vs. G.N.R.R. Co.*, 155 F. Supp. 307.

On the other hand, where the employee claims a wrongful discharge and actually proceeds through the grievance procedure and has an award of the adjustment board against him, it bars his damage suit. This is the exact holding of the United States Supreme Court in *Union Pacific R. Co. vs. Price*, 360 U.S. 601, 3 L.Ed. 2d 1460, 79 S.Ct. 1351. *Sarran vs. Mo. Pac. R. Co.* (writ ref) 330 S.W. 2d 925.

In the case now before this Court the plaintiffs processed their grievances first through Vaughan, *and*

they were denied, then through Wageneck, and *they were again denied*. They then appealed to the System Board which held a hearing, under protest by the airline, at which nothing was presented but an affidavit and the chairman ruled that such affidavit constituted no evidence and an abandonment of the claims. This resulted in a wrangle and a deadlock between the Union members and the company members. The Union members then held an ex parte hearing in which additional evidence was introduced and in which the company refused to participate. This too produced a deadlock. (S.F. p. 418 et seq.)

As the Court of Civil Appeals opinion accurately described the situation, the plaintiffs here first asked for an arbitrator to break the deadlock and then withdrew that request, and thereby permitted the decision in the last step of the grievance procedure against them to become final, since the 30 days for the appeal had expired some dozen times before the lawsuit was filed. Also, of course, as indicated by the cases above referred to, when the plaintiffs walked into the courthouse and asked for damages for wrongful discharge, the plaintiffs then conceded, as the Court of Civil Appeals says they did, that their employment was terminated at the beginning or the end of the strike and therefore they were not employees. But again, just to keep the plaintiffs from blowing hot and cold, and to reinforce the Court of Civil Appeals decision, we point out applicable authorities, holding directly in this exact situation that having proceeded part way up the grievance procedure and letting become final a decision against them, the cause of action for dam-

ages is forever barred. Among these cases are the following:

Crusen vs. United Air Lines, Inc. (D.C.-Colo, 1956), 141 F. Supp. 347, affirmed 239 F. 2d 863;

Barker vs. Southern Pacific Co. (1954), 214 F. 2d 918;

Breeland vs. Southern Pacific Co., 231 F. 2d 576;

Peoples vs. Southern Pacific Co., 232 F. 2d 707;

Atlantic Coast Line R. Co. vs. Pope (4th C.C.A.), 119 F. 2d 39;

Hooser vs. B. & O. R. Co. (7th C.C.A.), 279 F. 2d 197;

Anson vs. Hiram Walker & Sons, Inc. (7th C.C.A.), 248 F. 2d 380.

For this additional and alternative reason, the judgment of the Trial Court and the Court of Civil Appeals is correct.

SUMMARY

JURISDICTION

The respondent denies jurisdiction, first, because petitioners had a lengthy trial on the merits, and every issue of fact was found and decided against the petitioners. Petitioners do not attack the fact findings, but seek to have the United States Supreme Court give them a de novo consideration of the facts, which the Supreme Court of the United States has no jurisdiction to grant.

Jurisdiction is denied, also, because the petitioners failed to file a motion for rehearing on their Application for Writ of Error, and therefore under the jurisdictional statute they did not exhaust their state remedies, and this is not an appeal from the final judgment "by the highest court of a state in which the decision could be had."

FIRST SECTION

This is a lawsuit filed in the State District Court by the petitioners as plaintiffs, claiming a wrongful discharge by the defendant, Central Airlines, Inc. What happened was that the company ordered six employees (the Cornstubble Six, not plaintiffs here) to work overtime, and they refused. The company then instructed the Cornstubble Six to report to their foreman and give their reasons for refusal to work overtime. The Cornstubble Six refused to give reasons for their failure to work overtime unless there was a union representative present at the interview by the foreman. The company took the position that what

was contemplated was merely a part of the investigation to determine whether discipline would take place. The union representatives met the company representatives, and a long hassle ensued as to whether under the union contract the Vaughan interview was a "hearing" or merely an investigation. The union was adamant that no interview would take place unless a union representative was present, and the company was adamant that under its construction of the contract it was entitled to carry on its investigation without interference by the union. No interview took place. No hearing took place at which the union was not present. The Cornstubble Six were discharged because they refused to work overtime and because they refused to give any reason for their failure to work overtime. They immediately prepared grievances complaining of the action of the company. All this took place on April 7, 1958. That night there was a union meeting and a strike vote was taken, and at midnight the union went on strike. At 10:00 A.M. on April 8 the grievances for the Cornstubble Six were filed. They were duly processed, and a hearing was held, at which union representatives were present, for the Cornstubble Six, on April 14, 1958, and the strike was terminated on April 17, 1958. In the interval, the company publicly announced, and the union and the employees had notice, that the company was hiring permanent replacements. The company likewise rearranged its work, added supervision, contracted out some of the work which had been contracted out in the past but was not contracted out at the time of the strike, and carried on its business without interrup-

tion, although the strike lasted ten days, as indicated. There were two meetings between the company representatives and the union representatives with reference to calling off the strike. The union representative demanded that all of the strikers be taken back, and the company refused to fire the permanent replacements and to change the re-arrangement of its work and to eliminate the efficiencies put into effect during the strike. Finally, the company agreed that it would take back the strikers in the order of their seniority, to the extent that there were vacancies then available. It scrupulously lived up to its agreement, taking back all of the strikers in the order of their seniority, and the union admitted that the company lived up to that agreement. Actually, the strikers taken back were restored to their prior seniority, and the plaintiffs in this case represent those strikers for whom there were vacancies not available, and in a few instances some who took jobs of lower classifications for a temporary period because of the fact that other strikers who were taken back had more seniority for the particular classification.

The respondent says, in the first place, that a strike over a matter which could have been, should have been and was actually handled through the grievance procedure to final arbitration, is illegal under the Railway Labor Act.

The company says, in the second place, that any strike (under the Railway Labor Act or under the N.L.R.A.) over a matter which could have been, should have been and was actually handled through a griev-

ance procedure which provides for final arbitration, is illegal. In other words, you cannot have a legal strike over a grievable matter if the contract provides for a grievance procedure and binding arbitration.

The corollary to the fact that the strike was not only unjustified but illegal was that the company had the right to consider that the participants in such a strike had terminated their employment. Or, to put it another way, it had a right to discharge the employees who participated in such an illegal strike, and had no obligation to re-instate them with or without seniority.

Further, the company says that even if the strike were not illegal, it was at most an attempt by the union and the men it represented to force upon the company the union's construction of the contract, and as in any other economic strike the company had a right to defend itself by hiring replacements. When the union called off the strike the company did the most that any employer could be required to do, and that is to the extent vacancies were available to fill them on a non-discriminatory basis. The basis on which the company agreed to hire strikers was in the order of their seniority. Having complied strictly with that non-discriminatory re-employment, and none of the re-employed strikers being discriminated against or having lost seniority, plaintiffs have no cause of action.

SECOND SECTION

This is an alternative position. The respondent says that when the petitioners filed suit in the District Court of Tarrant County, Texas, for wrongful discharge, they recognized the permanent termination of their employement and were relegated to an action for damages for wrongful discharge. That they had a trial on the merits on that issue, and lost on fact findings against them. If the respondent, however, is wrong and the petitioners did not by filing suit in the District Court of Tarrant County, Texas, recognize the final and complete termination of their employee status, then the respondent says that the petitioners and each of them filed grievances claiming such wrongful discharge in accordance with the union contract, and such grievances were denied at each hearing. That ultimately same went to the System Board of Adjustment, at which time the union failed to present them. When the company representatives and the union representatives were unable to agree whether there was or was not anything before the System Board, the union applied for arbitration and then withdrew the request. Under the contract more than 30 days (many times more) expired, thereby making final the adverse decision on the merits of these grievances. The respondent says that under such circumstances, if the plaintiffs did not terminate their employment by participation in an illegal strike, they pursued the employee grievance procedure route, lost, and cannot now litigate in the District Court the alleged wrongfulness of their discharge.

CONCLUSION AND PRAYER

WHEREFORE, premises considered, the respondent respectfully prays that the Petition for Certiorari be dismissed for want of jurisdiction, or, in the alternative, that it be denied.

Respectfully submitted,

MUELLER & MUELLER
Burk Burnett Building
Fort Worth 2, Texas

HUDSON, KELTNER, JORDAN, SMITH & CUNNINGHAM

By
Luther Hudson
Continental Life Building
Fort Worth 2, Texas
Attorneys for Respondent

Two copies of this Reply to Petition for Certiorari have been mailed to Charles J. Morris of Mullinax, Wells, Morris & Mauzy, 1601 National Bankers Life Building, Dallas 1, Texas, and one copy to Plato E. Papps, 1300 Connecticut Avenue, Washington 6, D.C., attorneys for petitioners, on the same day that it was mailed to the Clerk of this Court.

APPENDIX

THE SUPREME COURT OF TEXAS
AUSTIN

July 30, 1962.

Robert W. Calvert
Chief Justice
Meade F. Griffin
Clyde E. Smith
Frank P. Culver, Jr.
Ruel C. Walker
James R. Norvell
Joe Greenhill
Robert W. Hamilton
Zollie Steakley
Associate Justices

Geo. H. Templin
Clerk

Mr. Charles J. Morris, Attorney
Mullinax, Wells, Morris & Mauzy
1601 National Bankers Life Building
Dallas 1, Texas

Re: International Association of Machinists vs. Central Airlines, Inc., No. A-9035.

Dear Mr. Morris:

I have received your letter of July 27, 1962, enclosing petitioners' Motion for Rehearing and Request for Oral Argument in the above case. The envelope shows that the above was mailed in Dallas July 27, 1962, at 7 p.m. As the Court denied the application July 11, 1962, it appears that the Motion for Rehear-

ing was received too late for filing. You may let me know if you want me to return the Motion to you.

Yours very turly,

/s/ George H. Templin
Clerk.

cc: Hudson, Keltner, Jordan & Cunningham
Fort Worth, Texas
Mueller & Mueller
Fort Worth, Texas

Art. 1728, *V.A.C.S.*:

"The Supreme Court shall have appellate jurisdiction co-extensive with the limits of the State, extending to all questions of law arising in the following cases when same have been brought to the Courts of Civil Appeals from appealable judgment of trial courts:

"1. Those in which the judges of the Courts of Civil Appeals may disagree upon any question of law material to the decision.

"2. Those in which one of the Courts of Civil Appeals holds differently from a prior decision of another Court of Civil Appeals, or of the Supreme Court upon any question of law material to a decision of the case.

"3. Those involving the construction or validity of statutes necessary to a determination of the case.

"4. Those involving the revenues of the State.

"5. Those in which the Railroad Commission is a party.

"6. In any other case in which it is made to

appear that an error of substantive law has been committed by the Court of Civil Appeals which affects the judgment, but excluding those cases in which the jurisdiction of the Court of Civil Appeals is made final by statute."

Art. 1729, *V.A.C.S.*:

"All causes mentioned in the preceding article may be carried to the Supreme Court either by writ of error or by certificate from the Court of Civil Appeals, but the Court of Civil Appeals may certify any question of law arising in any such case at any time they may choose, whether before or after the decision of the case in said Court."

Art. 1730, *V.A.C.S.*:

"The Supreme Court shall from time to time make and promulgate suitable rules, forms and regulations for carrying into effect the articles in this title relating to the jurisdiction and practice of said Court."

Texas Rules of Civil Procedure, Rule 515. Motion for Rehearing:

"A motion for rehearing may be filed with the clerk of the court within fifteen days after the date of rendition of the judgment or decision of the court or the order refusing or dismissing an application for writ of error, whether such date be in the same or a succeeding term of such court. In exceptional cases, if the ends of justice require, the court may shorten the time within which the motion may be filed or even deny the right to file it altogether. The grounds relied upon for the rehearing shall be distinctly specified in the mo-

tion. The motion shall give the name and residence of the counsel of the opposing party if known, and if not known, the name and residence as shown in the record. The party filing such motion shall deliver or mail to each opposing party, or his attorney of record, a true copy of such motion, and shall note on the motion so filed with the clerk that such copies have been so furnished. Upon his failure to do so, he shall accompany his motion with or furnish to the clerk on his request a sufficient number of duplicates or copies thereof for the clerk to use in complying with the provisions of Rule 516. Failure to supply such copies on request of the clerk may result in dismissal of the motion. As amended by order of Sept. 20, 1941, effective Dec. 31, 1941; and by order of Oct. 12, 1949, effective March 1, 1950."